



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

GOVERNMENT CONTROL OF BUSINESS *

II The Regulation of Business in England

If we go back beyond the seventeenth century in English history, we fall upon a time "when it was an accepted tradition to supervise production, regulate employment, and exclude competition."⁸

The social spirit of that time was so different from our own that we can with difficulty grasp the situation history presents to us.

That social condition might be considered as static or fixed as compared with the wonderfully fluid condition of the present day public. There was little changing from one occupation to another, and little opportunity for change. The earliest traceable regulations seem to have been directly imposed by the local guilds on the municipal authorities and they closely controlled individual and trade activity. Yet the local regulations of the twelfth century appear to have been the approved method of control, licensed by the king in his organization of the guild, and from which he seems to have derived revenue.⁹

The theory of the times is thus expressed:

"The public authorities . . . felt themselves bound to regulate every sort of economic transaction in which individual self interest seemed to lead to injustice. This regulation was guided by the general principle that just or reasonable price only should be paid, and only such articles sold as were of good quality and correct measure."¹⁰

It seems also to have been required that all selling be done in public.¹¹

*The first part of this article appeared in the April, 1920, number of the *Columbia Law Review*.

⁸Selden Society Publications, Vol. XXVIII, *Select Charters of Trading Companies (1530-1707)* Intro. p. XIV.

⁹Salzmann, *English Industries of the Middle Ages*, Ch. XI. p. 201.

¹⁰Ashley, *English Economic History* (3rd ed.) *The Middle Ages*, p. 181, 1894.

¹¹One instance in 1384: (Ashley, *Op. Cit.*, p. 184). "John-at-Wood, Baker, was charged before the common seargent with the following offense: Whereas one Robert de Cawode had 2 quarters of wheat for sale in common market on the pavement within Newgate, he, the said John, cunningly and by secret words whispering in his ear, fraudulently withdrew Cawode out of the common market; and then they went together to the church of the Friars Minor, and there John bought the quarters at 15½d per bushel being 2½d over the common selling price at that time in that market; to the great loss and deceit of the common people, and to the

Writers like Adam Smith stand in horror of such interference with 'natural law' and 'natural rights':

"The popular fear of engrossing or forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate witches accused of this latter crime were not more innocent of the misfortunes imputed to them than those who have been accused of the former."¹²

But it is difficult to see how rights, strictly speaking, were violated; for a right, as we understand it, must consist of certain elements: first, a claim or interest on the part of the individual supposed to be deprived of this right; second, the recognition by the state of this interest as a proper object for its protection by state machinery—and there must be some state's machinery adapted to that purpose. So where no individual has as yet made the claim or felt conscious of the interest as one worthy of assertion, there is not even the basis of a right, aside from the lack of application of the state's machinery to that purpose. Of course, if the right is once recognized it may then continue to exist as such even though no individual happens to make claim to its assertion; but the right will never arise unless somewhere at some time, some one or more individuals make the primary assertion of the claim as one worthy of protection. One reason for the extreme policies of that time was the prevalence of certain views as to the wrongfulness of trade for the purposes of gain. These views, especially as applied to money as a source of gain had support in ancient writers.¹³ Also these doctrines were deeply ingrained in medieval thought by the canonical writers.¹⁴ In

increase of the dearness of corn. He was sentenced to be put into pillory 3 hours, and one of the Sheriffs was directed to see the sentence executed and proclamation made of the cause of his punishment;"

Note also the following ordinance ascribed both to 51 Henry III and 13 Edw. 1: "Be it enacted that no forestaller be suffered to dwell in any town; a man who seeking his own evil gain, oppressing the poor and deceiving the rich, goes to meet corn, fish, herrings, or other articles for sale as they are being brought by land or water, carries them off, and contrives that they shall be sold at a dearer rate—he that is convicted thereof, the first time shall be amerced and lose the things so bought, and that according to the custom and ordinance of the town; he that is convicted the second time shall have judgment of the pillory; at the third time he shall be imprisoned and make fine; the fourth time he shall abjure the town, etc."

¹²See *Wealth of Nations* (Rogers, 2nd. ed.) 103 *et seq.*

¹³Aristotle, *Politics*, Bk. 1, c. 8, 9.

¹⁴Aquinas taught that to buy a thing for less and sell it for more than its value is not allowable and is unjust: *Summa Theologiae Secunda Secundae, quaestio LXXVII Art. 1, Augustine de Tron. 13, 3*; and the views of St. Ambrose, *Corp. Jur. Canonici I*, Dist. 47, C8.

addition the church, as the guardian of the public morals, professed to find that trade for gain led to deceit.¹⁵

Up to the sixteenth century trade and commerce were small and confined chiefly to luxuries, and, so far as it was a lucrative business at all, to foreigners and Jews. The whole situation, economic and social, the temper of the people, the interests and the views of the clergy, who were the only class of any high order of intelligence, all combined to make possible a situation wherein men freely acquiesced in an almost total control of business activity, first by the local guilds and the local authorities, but passing gradually into the hands of the king from the twelfth to the fourteenth centuries.¹⁶

By the middle of the fourteenth century, the king, now acting, nominally, through Parliament, was practically supreme. The growth of trade had broken the narrow bounds of medieval industrial life and state control became the order of the day.¹⁷

Speaking of the fifteenth century, Cheyney¹⁸ says that the functions of the government had come

"To include the control of all forms of industrial life, including agriculture, manufacturing, commerce, internal trade, labor, and other economic relations. The control of economic and social matters by the government was in accordance with contemporary

¹⁵For general discussion of this point, see Ashley, *English Economic History* (3rd ed.) Middle Ages, Chap. III; also note the following:

"The end of why all men be create
As men of wisdom do agree
In to maintain the public state,
They riches were given to thee
That thou might'st make provision
In far countries for things that be
Needful for thine own nation
Content thyself with a living.

Crowley, "The Merchant's Lesson" in "The Voice of the Last Trumpet" (1550) *Select Works*, 86.

¹⁶See assize of measures, 1197, Roger de Hovenden (Rolls Series) IV, 33. An early attempt by central authority to make weights uniform that being the apparent purpose rather than to supercede the local authorities. The administrative machinery being at that time inadequate and continuing so up to the 15th century.

There were occasional conflicts between the Royal and local authorities as witness the seizure of the privileges of London from 1285-1298. *Carta Mercatoria*, 1303 by Edw. I, was really an encroachment upon local authorities in that it protected as well as taxed foreign merchants toward whom local feeling was hostile, also the earlier assize of cloth and assizes of bread and ale. Salzman, *English Industries of the Middle Ages*, Chap. XI, p. 201.

¹⁷Ashley, *English Economic History* (3rd ed.) c. 2.

¹⁸*Industrial and Social Development of England* (1901) 174.

opinions and feelings. An enlightened absolutism seems to have commended itself to the thoughtful men of the time. A paternalism which regulated a very wide circle of interests was unhesitatingly accepted and approved. . . . Almost all economic conditions were regulated by the government to a degree quite unknown before. . . . By the close of Elizabeth's reign a systematic regulation was established which while not controlling every detail of industrial life yet laid down the general lines along which most of the industrial life must run—it was now regulated in its main features by the all powerful national government."

The beginnings of regulation of the labor of women and children seem to have come in this period.¹⁹ But now there comes a change. The sixteenth century forecast the economic revolution both as to English home industry and as to commerce. This economic revolution was to be:

"A change from the old dependent, uncompetitive and regulated industrial system to one under which capital and labor grew up as separate forces in the form in which we recognize them now. . . . A new and eager spirit came with the Renaissance and the Reformation, a spirit which on the economic side showed itself in the development of competition, the shaking off of old restraints."

Even before this time the same tendency had manifested itself within the towns.²⁰

But the economic revolution does not seem to have been a rising against grievances so much as an awakened popular spirit. Men seemed suddenly to have discovered that there are things worth striving for in life. This recognition came partly from the fact that boundless opportunities were just opening in the new world with its free land and unbounded natural resources. It awakened hope and enterprise; it stimulated and spurred men on to risks and adventures theretofore undreamed of. An immense growth of individual initiative was thus called forth—it became the spirit of the new age. The petty economies of the past seemed of less importance in the face of new and boundless wealth waiting only to be made use of. So trade grew, commerce thrived, industry was stimulated, and the foundations were laid for the transition from the hard, grinding and closely supervised life of the middle ages to the free and untrammelled *laissez faire* of the closing decades of the eighteenth century. Yet even that change, as we shall see, was very slow; for habit and institutions still had their

¹⁹Riley, *Memoirs of London*, 278, 549; Townmiling Smith, *English Guilds*, 179.

²⁰Ashley, *English Economic History* (3rd ed.) c. 1, p. 10.

weight and many years were required to work the complete emancipation. But it is significant to note in this connection that today the return to more complete supervision of individual activities and the movement away from *laissez faire* follows, in America, closely upon the passing of free land and after a great part of the wealth of easily available raw materials has been used and when great numbers of men have, because of the growth of cities and the crowding of urban populations, again become as dependent as they formerly were because of lack of transportation or dearth of materials. Truly, economic theories change with the change in human needs, and just as surely our law and our institutions must adapt themselves to the new needs. And if the new situation in its essential characteristics closely resembles an ancient one, we must expect to see institutions and principles that applied in that ancient situation revived and applied to the modern need.²¹

The preliminary stage of the economic revolution showed itself first in a political way.

"The Whig jealousy of arbitrary power divested the executive of personal control over commerce and industry; and the authority, which had been exercised by the crown, passed almost entirely into the hands of the house of Commons."²²

From this time on, industrial control was exercised by Parliament and owing to the growth of industrial interests and of commerce in England the traders were increasingly well represented in the Commons. Yet, apparently,

"During a period of more than two centuries, from the beginning of Elizabeth's reign until the accession of Pitt to power the effort to promote economic progress by governmental action was steadily maintained."²³

It must be noted also that

"English Public opinion did not set in the direction of *laissez faire* until the country had had long experience of the evils of the mercantile system as reconstructed by a constitutional government."²⁴

²¹The writer is indebted to his friend Professor George J. Thompson of Pittsburg University Law School for helpful discussion and concrete suggestions, particularly in connection with this part.

²²2 Cunningham, *Growth of English Industry and Commerce*, 22. Freund, *Standards of American Legislation*, 189.

²³2 Cunningham, *op. cit.*, p. 20, 1907 (4th ed.) p. 20.

²⁴2 Cunningham, *op. cit.*, 19.

Speaking of the same period in his *Introduction to the Industrial and Social History of England*, Mr. Cheyney says:

"The complete acceptance of the view that it was a natural and desirable part of the work of the government to regulate the economic life of the people had persisted well past the middle of the 18th century. But very different tendencies of thought arose in the latter part of the century. One of these was the prevailing desire for greater liberty. The word liberty was defined differently by different men, but for all it meant a resistance to oppression, a revulsion against all interference with personal freedom of action, a disinclination to be controlled any more than absolutely necessary, a belief that men had a right to be left free to do as they chose so far as such freedom is practicable. As applied to economic interests this liberty meant freedom for each person to make his living in the way he might see fit . . . government regulation, . . . was an interference with natural liberty.

A second influence . . . was the prevalent belief that if men could get back to a 'state of nature' and start again, things might be much better . . .

A third . . . was the development of a consistent body of teaching which claimed to have discovered natural laws showing the futility and injuriousness of any such attempts".²⁵

As a natural result of such a state of the public mind Parliament, without any change in the fundamental law, ceased to legislate upon economic matters.

"Those who regarded freedom for enterprise as an ideal, were inclined to insist that it was a natural right which had been preserved by constitutional safe guards. A committee of the House of Commons gave a new reading to the rights of Englishmen.²⁶ 'The right of every man to employ the capital he inherits or has acquired according to his own discretion without molestation or obstruction, so long as he does not infringe on the rights or property of others is one of those privileges which the free and happy constitution of this country has long accustomed every Briton to consider as his birth right'.²⁷

It was the beginning of legislative servility to capital and dominating interests and also the beginning of that deep distrust

²⁵Cheyney, *Introduction to the Industrial and Social History of England*, 284, et seq.

²⁶Quoted by S. & B. Webb from *Reports 1806 III*, 12.

²⁷Cunningham, *The Industrial Revolution* (1908) 739. The presence of statutes against labor unions mark the first quarter of the 19th century. The laborers were not so favorable to the views of the economists, apparently.

and strife which have so unfortunately marked the relations of capital and labor.²⁸

Perhaps one fact which helped in the extreme lengths to which the *laissez faire* doctrines went, was the old practice of giving of monopolies by the king. This seems to have become very burdensome. Sir John Colpepper in the Long Parliament²⁹ says:

"I have one more grievance to offer unto you; but this one compriseth many; it is a nest of wasps, or swarm of vermin, which have over crept the land. I mean the monopoliers and polers of the people. These like the frogs of Egypt have got possession of our dwellings."

Men hoped under *laissez faire* to escape all burdens of monopoly, with what warrant our own industrial history can best tell.

Viewed from the standpoint of others than the capitalist, the eighteenth century discovers to us

"A Britain in which the consumer was in a way, at the mercy of the producer, the laborer defenseless against the employer. The consumer's remedy lay only in smuggling, the laborer's in riot".³⁰

Such seems to have been the rather chequered career of industrial regulation in England, and so confusing is the picture that it is little wonder that many varying conclusions have been drawn as to the relation of the situation as it presented itself at the time of the framing of the Constitution of the United States, to fixed constitutional rights. We must discount the judgment of any man to some extent upon this question, because men see so largely through the discolored and distorted lenses of their personal economic and social views. Professor Freund in his *Standards of American Legislation*, says:

"It is true that toward the end of the seventeenth century a long period set in during which economic and social regulation was sparingly used (except so far as external 'commerce' was concerned) and incisive interference with the conduct of private business revived only with the new factory legislation at the beginning of the nineteenth century. . . . The transfer of practically all the regulative power to Parliament had the effect of removing from the English law the concept of a sphere of individual immunity from regulation as a legal right. That happened at the very time when continental jurists began to claim for natural law a positive

²⁸Cunningham, *op. cit.*, p. 740.

²⁹Parl. Hist. II, 656, quoted 2 Cunningham, *Growth of English Industry*, 307.

³⁰2 Atton & Holland, *The King's Customs*, Preface p. V.

force and status. They not only developed the theory of vested rights, which has remained foreign to the technical terminology of the English law, but contended that laws violating the natural limitations of sovereign power were null and void, and in Germany territorial statutes were questioned on that ground in the imperial courts as denials of justice just as they are attacked in America as violating due process of law".^{30a}

In the opinion of Professor Freund, it will be noted, the fact of Parliament's control of business prevented questions of constitutional power to regulate, from being seriously raised in England even at a time when the tendency elsewhere was to spin claims of individual immunity from government regulation out of the airy web of natural law theories. To quote further from Professor Freund:

"Strong as was the conviction in England that the male adult person should not be interfered with in his economic arrangements, even the most individualistic of English thinkers do not hint at possible limitations of a legal character upon Parliament".

It will appear from this hasty review that while many controversies arose in England between local authorities and the Crown and later between the Crown and Parliament, yet on the whole a searching control of business was never adjudged unlawful. The policy pursued by the government, whether exercised by the royal or legislative branches, was always in accord with the economic and social views of the times, and the disappearance of control as an existing fact in the eighteenth century was but natural; for the lawmaker is only the man of his time speaking in accordance with the times and place and beliefs of his people rather than expressing his own will.³¹

The silence of Parliament, the absence of regulative legislation during the latter part of the eighteenth century, was only an expression of policy, for "Public policy is but the manifest will of the state".³²

Thus the absence of restrictions at the beginning of the nineteenth century was merely recognition of the theory of *laissez faire* as the doctrine of the world of trade and commerce. We can quite safely say, therefore, that, at least aside from the American written Constitutions, it has always been lawful, so far as legal or implied

^{30a}*Op. Cit.* at p. 189.

³¹Kohler, *Lehrebuch des Burglichen Rechts*, 38; see Pound, Courts and Legislation, 7 Amer. Pol. Sci. Rev. 379-80.

³²Jacoway v. Denton (1869) 25 Ark. *625 at *634.

constitutional restraints in Anglo-American law are concerned, for the legislature to adopt any policy of regulation of business that the economic and social thought and conditions of the time will permit. The legislative body should adapt its policies to the times and conditions in order to make them workable. That they should accord with some conceivable existing economic doctrine at the time of their enactment is, to say the least, desirable and necessary if they are to be effective, but that does not at all mean that legislatures of today are bound by the legislative precedents of yesterday, for today there are new conditions that did not affect the past at all, and even modern economic theories are not universally true; such theories

“are true neither for the past, when the conditions they postulate did not exist nor for the future, when, unless society becomes stationary, the conditions will have changed.”³³

When priests ruled the consciences of men and deemed trade to be the enemy of men's souls, trade was repressed and frowned upon. Later when the King, primarily for his revenues, allowed or encouraged the growth of trade and commerce and chartered and authorized trading companies, and later still when England began to take her place as a commercial power, it was never a question of power or right as to whether this or that step looking to regulation should be taken, it was only a question of policy. A question did arise between King and Parliament as to who was to be the final arbiter in settling that policy; but that controversy does not interest us because the legislative or policy determining branch of the government is for us pointed out by the constitution.

III The Problem Under Our Constitutions

To what extent may occupations or businesses, which have not in modern times been classed as public or regulated by the state, be made the subjects of regulation under our American constitutions? We may leave out of account all instances where the business in question is obliged to depend upon and accept some legal privilege from the state, or where there is some dedication to an essentially public use. There remain for our consideration ordinary businesses which may or may not partake of the nature of virtual monopolies.

The purpose of a written constitution is to imbed certain sup-

³³Ashley, *English Economic History* (3rd. ed) *The Middle Ages*, Preface, XI.

posedly necessary principles permanently in the structure of our national life.³⁴ But constitutions contain express prohibitions and commands which only indirectly represent principles. These commands are, nevertheless, binding upon legislatures although the principle upon which they were originally based would not now be invoked. Also, in some cases, principles are imposed in general terms, the content of the principle being left to construction in the light of history. Such a term is *due process of law*; and it may be asked whether *due process* as a *test of legislative action* gained any new or *different quality* from the fact of its *mention* in the *Constitution*. That what may be called *due process*, historically, changed constantly through the ages admits of no doubt. When embodied in our constitution did it at once, for us, become rigid, embodying as a part of it economic and social doctrines of that time, or does it still remain a living, growing thing, adapting itself constantly, as in ages past, to the needs of society? *Due process* must mean exactly what it meant under the English constitution down to the days of George III., for since it is a phrase not otherwise defined it must have had, as used, the meaning current when it was written into the constitution or the fifth amendment thereof. But at that time, as ever in English history, it only meant that legislatures should serve the public, derive their rights from representation, and not act oppressively nor individually. For although the English Parliament had done all these things, yet the framers of our constitution held that there were limits to legislative right. But, aside from limits placed by colonial theory, by Magna Carta, or by the Bill of Rights, the term *due process* when adopted into the Federal Constitution brought with it out of the past no hint of any limitation upon legislative power, and those instruments suggest no further limitation than as outlined above. It would seem, then, that under our constitutions the legislature should be free to adopt any policy, or act upon any principle of conduct not clearly opposed to the trend of public thought and the needs of society, and not arbitrary or personal in its intent or effect upon any individual.

Although the fourteenth amendment was framed long after the adoption of the fifth amendment, yet *due process* as therein

³⁴Yet, comparing our own experience with that of England, any principle, so far as it is really fundamental in the life of the people will assert itself sufficiently and if it is not so fundamental or if the needs of a nation or a people change, the situation results that a principle that no longer has significance seems to warp the development of the national life, as is the case of the old theory as to Senatorial election in America.

provided for is conceded to be the same as the due process of the earlier amendment.³⁵

Since no enumeration of callings which may be pursued without hindrance or regulation appears in our constitution, our courts have been driven to seek what have sometimes been called "fundamental rights of occupation". That there are certain fundamental principles back of our law, embodied in and preserved by the constitutions, principles which legislatures are not at liberty lightly to disregard, is often judicially asserted. Such decisions assert a right of freedom from restraint for the individual in the conduct of his business.

"The fact of a fundamental right of liberty on the part of an individual to pursue any lawful calling in his own way so long as it does not interfere with the welfare of the public seems to be asserted by the Courts".³⁶

One extreme statement of this view is as follows:

"The right to follow any of the common occupations of life or to earn one's living in any innocent vocation without let or hindrance is one of those inalienable rights covered by the statements in the Declaration of Independence and secured to all those living under our form of government by the liberty, property and happiness clauses of the national and state constitutions".³⁷

It might be suggested that what is an innocent vocation is a relative matter, and the term cannot be applied fairly without considering the interest of the public. Moreover, we must recognize the fact that the "liberty" clauses of the constitution were aimed, not to protect aggressiveness but to prevent exploitation; not to encourage strife and controversy but to prevent, to the extent necessary, at the time of their adoption, class oppression. Freedom of contract, even, so far as it is guaranteed, is coming to be recognized as a real, in the sense of practical, freedom on both sides; and we are less inclined to apply or to interpret the consti-

³⁵Due process under the 14th amendment "only demands of the states what Magna Charta demanded from the time our ancestors set foot upon American soil * * * that amendment gave a veto power upon state action upon the citizen not consonant with due process of law, but gave no definition." *State v. Sponaugle* (1898) 45 W. Va. 415, 32 S. E. 283.

³⁶*Rast v. Van Deman & Lewis Co* (1915) 240 U. S. 342, 366, 36 Sup. Ct. 370.

³⁷*State v. City of Sheridan* (Wyo. 1918) 170 Pac. 1. Cf. also *In re Leach* (1893) 134 Ind. 665, 34 N. E. 641, and *Tolliver v. Blizzard* (1911) 143 Ky. 733, 137 S. W. 509.

tution so as to give the advantage always and necessarily to the stronger, the more crafty, and the more assertive party.³⁸

But, it is asserted, these fundamentals are economic and social standards. Mr. Justice Field of the United States Supreme Court said:³⁹

"It has been well said that 'the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just *liberty* both of the workman and of those who might be disposed to employ him. As it hinders one from working at what he thinks proper, so it hinders others from employing whom they think proper'. Adam Smith's *Wealth of Nations*, Bk. 1, C. 10."

The impression gained is that because Adam Smith objected to a thing it is therefore unconstitutional. But for another view note the language of the Supreme Court in *Otis v. Parker*.

"Considerable latitude must be allowed for difference of view as well as for possible peculiar conditions which this court can know but imperfectly if at all. Otherwise a constitution instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a peculiar set of ethical or economical opinions which by no means are held *semper ubique et ab omnibus*."

And, as Justice Holmes remarked in his dissent in the *Lochner* case:⁴¹

"The fourteenth amendment does not enact Mr. Herbert Spencer's *Social Statics*."

and the fifth amendment goes no farther in that direction.

"Economic policies—however firmly rooted in habits of thought or structure of society are, by their very nature, unfit to be identified with the relatively immutable concept of due process. When the makers of constitutions did intend to establish policies, they

³⁸*Cf.* Pound, *Liberty of Contract*, 27 *Yale Law Journal* 454. And the police power may limit contract even where the parties are of full age and competent, when they do not actually stand upon an equality. *Holden v. Hardy* (1897) 169 U. S. 366, 18 Sup. Ct. 383.

³⁹*Butchers Union Slaughter House Co. v. Crescent City Live Stock Co.* (1883) 111 U. S. 746, 757, 4 Sup. Ct. 652.

⁴⁰(1903) 187 U. S. 606, 608, 609, 23 Sup. Ct. 168.

⁴¹(1905) 198 U. S. 45, 25 Sup. Ct. 539.

did so in express terms: freedom of speech and press, religious liberty, the favor to the accused in criminal proceedings—these we find guaranteed in specific clauses; and nothing was guaranteed that had not at some time been a live issue. It was foreign to their minds to foreclose issues that no one could foresee. Due process was an idea centuries old and meant to last for centuries.”⁴²

And, as Professor Pound has said, it is

“contrary to their [the framers of the Constitution] principles to assume that they intended to dictate philosophical or juristic beliefs and opinions to those who were to come after them.”⁴³

Moreover, as we have seen:

“The common-law concept of civil liberty was by no means repugnant to regulation in the public interest, but recognized such regulation as a proper and ordinary incident and qualification.”⁴⁴

That the possible limits of freedom of occupation or of the power of the legislature to interfere is by no means a fixed thing, but changing as the sentiment of the public changes, is stated thus:

“The practical content of this right (of freedom of occupation) seems to be subject to a whittling down process as a result of a change of sentiment on the part of the public which recognizes a new evil not heretofore recognized”;⁴⁵

and on page 365 of the same report the Court says:

“No requirement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business.”

Moreover, that the current of judicial opinion has changed and is changing is admitted:

“Is it an illegal meddling with a lawful calling and a deprivation of freedom of contract? This is the contention. * * * These contentions have the support of a number of cases. They are opposed by others, but not nearly so numerous as the supporting cases, *but marking a change of opinion.*”⁴⁶

The exercise of the power will vary, also, with differing conditions:

⁴²Freund, *Standards of American Legislation*, 32-33, see also pp. 20-21.

⁴³Liberty of Contract, 18 *Yale Law Journal*, 454, 467.

⁴⁴Freund, *Standards of American Legislation*, 188.

⁴⁵*Rast v. Van Deman & Lewis Co.* (1915) 240 U. S. 342, 366, 36 Sup. Ct. 370.

⁴⁶*Rast v. Van Deman & Lewis Co.*, *supra* footnote 45, at p. 363. Italics ours.

"Rights of property, like all other social and conventional rights, are subject * * * to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This power legitimately exercised can neither be limited by contract nor bartered away by legislation.

While this power is necessarily inherent in any form of government, it was, prior to the adoption of the constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments * * * which were then considered to be legitimate have fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations."⁴⁷

Earlier in the same decision it was said:

"The law is to a certain extent a progressive science; * * * that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests: while, upon the other hand, certain other classes of persons (particularly those engaged in dangerous or unhealthful employments) have been found to be in need of additional protection. * * * Of course it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue and the law be forced to adapt itself to new conditions of society."

In *Corn Products Refining Co. v. Eddy*, a case where an injunction was sought to prevent enforcement of a requirement that complainant make public the exact composition and method of manufacture of its product, the Court said:^{48a}

"The right of the manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."

Whatever, then, this fundamental right of occupation may be, it is subject to a changing and ever varying public need. What is today a right of freedom from interference may tomorrow, because of changed conditions, be no longer a right; in other words these "fundamental rights" of occupation are not based upon any given

⁴⁷Holden v. Hardy (1897) 169 U. S. 366, 18 Sup. Ct. 383.

^{48a}(1919) 249 U. S. 427, 431-2, 39 Sup. Ct. 325.

economic policy nor upon any fixed social theory, but merely upon the current social need which changes as conditions change.

"Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a-priori* reasoning. The judgment should be based upon a consideration of relevant facts actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law."⁴⁸

Chief Justice Waite once said⁴⁹ that the constitution does not confer power upon the whole people to control rights which are purely and exclusively private. It is difficult to restrain the observation that what the whole people do does not require any *affirmative* assistance from the constitution in the very nature of things; for it does not *disable its authors except* as they *agree* to be *disabled thereby*. But taking the statement seriously as it was intended, there still remains the question of when a business can be said to be "purely and exclusively private". Surely as a matter of fact and economic experience we are finding that business is largely interdependent—so much so that it is difficult to conceive of a business which deals at all with the public and yet is "purely and exclusively private", and as to when it is private the people through their legislative representatives must determine.

The question is, to determine where, if at all, the line should be drawn between so-called "public callings" and private occupations. It is asserted that there is a fundamental difference between these classes.

"* * * Comparison of the large amount of regulation which it is considered proper for the state to impose in regard to public services with the small amount of regulation which it is considered proper for the state to enforce in regard to private business is in itself significant enough. The difference which is shown is more than one of degree, it becomes one in kind. It is only in public business that the law imposes affirmative duties; generally speaking the duties imposed upon those in private business are negative."

But the same author says:

⁴⁸Dissent of Mr. Justice Brandies in *Adams v. Tanner* (1917) 244 U. S. 590 at p. 600, 37 Sup. Ct. 662. A sweeping statement of this view is that of Bierly, *Police Power State and Federal*, 11. Quoting Justice Jeremiah S. Black: "All property, corporeal or incorporeal is held upon condition that it may be divested whenever the general interest requires it."

⁴⁹*Munn v. Illinois* (1876) 94 U. S., 113, 124.

"The distinction between the private callings—the rule—and the public callings—the exception was the most striking feature of the law governing business relations. *The causes of the division are economic rather than strictly legal.* * * * in matters not vital to the life and well being of man-kind the laws of society may be left free to operate without limitation by the sovereign power; but in all that has to do with the necessities of life the protection of the sovereign is extended."⁵⁰

His argument, while admitting that the limits of the class called public may be extended from time to time, makes the prerequisite for extension some economic advantage in the business over some service or product which is of vital public necessity, in other words virtual monopoly. Any danger to the public from any other business might result in restrictions or prohibitions but not in the sort of regulation that is proper for the public service company.

A recent writer⁵¹ calls attention to the fact that at early common law the term "common" as applied to a business, meant no more than that such business was publicly engaged in; that a "common" smith differed from a smith not "common" only in the fact that he professed to work at a trade and that he openly invited public patronage, while the latter was merely the servant or workman of some other person, his master or regular employer. The common employment was, then, only the business in which the trade of the public at large was solicited.⁵²

This would seem to furnish a historical basis or criterion. A man who had relations with the public was liable to regulation as to such dealings. Even the farmer, as we have seen, was regulated as to the planting and handling of his crops because his industry vitally affected the narrow circle he could serve—narrow because of the absence of means of transportation. Under this historical

⁵⁰Wyman, *Public Service Corporations* (1911) preface XI, V.

⁵¹Edward A. Adler, *Business Jurisprudence*, 28 *Harvard Law Rev.* 135; see also his article, *Labor, Capital and Business at the Common Law*, 29 *Harvard Law Rev.* 241, 244.

⁵²*Labor, Capital and Business at Common Law*, 29 *Harvard Law Rev.*, 241 at p. 243, " * * * business at the common law consists in the undertaking and conduct of a community or public service for profit, and hence it is the duty of every one who takes upon himself a 'public employment' (Holt, C. J., *Lane v. Cotton* (1701) 1 *Ld. Raymond* 648, 656). The duty arises from the undertaking, the profession, and not from the necessities of the community, as often supposed. To carry on a business is to exercise a privilege. The right of a person to do with his own as he pleases need not be disputed. But a business man deals with what is not his own. He emerges from his privacy, involves the fortunes of the community with his own and by so doing assumes an obligation to the public. He ceases to be a private and becomes a common or public personage."

basis few men were not public in a sense—those who worked as servants or apprentices of another, or workmen in his private shop were outside the class; those who offered to serve the public came within the class. The person in the common trade served all who called for his services not because of any peculiarity in the nature of his business, not because of any dedication of his services to the public beyond entering the business, but because, in the light of economic and social conditions and theories then prevalent, the state thought it best to have him serve everyone who applied, and under state regulation.

We have found that the later common law of the seventeenth and eighteenth centuries came to differ from the earlier law in its treatment of the so-called public callings, as well as of private callings, because of a change of policy and social thought of the state as well, perhaps, as because of economic changes in the conditions of society itself.

This later common law continued the regulation of only part of the businesses "commonly" engaged in, leaving agriculture and other more strictly private businesses out of account. This change was due partly to the fact that the roads and means of travel were better and more opportunities to be served by any particular trade presented themselves to those having need of such service; and, secondly, because society had come to feel an interest in the freedom of the individual in his trade.

But, even granted that we have the two classes, public and private business, as applicable to those who deal with the public, yet, since we find that the dividing of the classes may vary from one century to another, it is little more than a matter of nomenclature that is settled; it amounts to this, that we reserve the term "public calling" for such callings as the law sees fit to put under affirmative regulations and retains the name private for other businesses. The essential inquiry is as to the power of the legislature to shift callings from the so-called private to this public class and to determine the amount of regulation which may be put upon any business, whether "public" or "private", and the basis upon which it may be exercised.

In *German Alliance Insurance Co. v. Kansas*⁵³ it was declared that it is not necessary that a business be public in order that it may be regulated; it is only necessary that it be affected with a

⁵³(1914) 233 U. S. 389, 407, 34 Sup. Ct. 612.

"broad and definite public interest". The Court says through Justice McKenna:

"The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied;' or, as we have said quoting counsel, 'where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist?' Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank vs. Haskell*, 219 U. S. 104, 55 L. Ed. 112), nor has the other contention that the service which cannot be demanded cannot be regulated."

After reviewing *Mumm v. Illinois*,⁵⁴ *Budd v. New York*,⁵⁵ and *Brass v. North Dakota*,⁵⁶ the Court continues:

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation—the underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.' Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past, and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today."⁵⁷

⁵⁴(1876) 94 U. S. 113.

⁵⁵(1892) 143 U. S. 517, 12 Sup. Ct. 468.

⁵⁶(1894) 153 U. S. 391, 14 Sup. Ct. 857.

⁵⁷See *La Tourette v. McMaster* (1919) 248 U. S. 465, 40 Sup. Ct. 160, In this case the question was whether the business of an insurance broker was so affected by a public interest as to be subject to state regulation. The court says, "the statute makes him the representative of the insured. He is also the representative of the insurer—and his fidelity to both may be the concern of the state to secure.

Justice Lamar dissented, apparently basing his dissent on the supposedly cardinal principle that there is a hard and fast line drawn between the police power which may limit the scope of private activity and the power of regulation over businesses public in nature, and that to apply the rate fixing power to the former is to obliterate that line

“between the power to take for public use and the power to regulate the exercise of private rights for the public good. That is the fundamental proposition on which the case must stand—it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the general assembly—And if this power be as extensive as it is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of labor under legislative favor rather than under Constitutional guaranty.”

Here is sharply and clearly brought out two conflicting views as to law—one that it is a development, constantly adapting itself to the needs of those it serves, only the most fundamental principles which underlie it remaining constant; the other that law is a sum of verities handed down from an infallible past with unbending rules for each type of situation.

The case clearly destroys all vestige of an artificial line between businesses public in nature which may be regulated affirmatively and businesses private in nature which may only be subjected to negative restrictions. It shows the power of the government not cut up into mutually exclusive segments, each applying to its peculiar category of situations and to no other; it shows the power of the government adequate to the needs that may arise, to regulate either affirmatively or negatively any business which becomes of vital interest to the public. It is not true as has been asserted⁵⁸ that the duty to serve all the public must co-exist with the liability of a business to intimate affirmative regulation as to rates and charges by the state.

It is true that for purposes of application it is convenient to treat certain types of situations by themselves; but the sovereignty of the state is concerned, not in the type of situation but only in balancing the interests of society on the one hand with those of the individuals or group of individuals on the other. Classification as public or private in the case of business, or any other categories of fact, is only a sort of tying into bundles to facilitate the carrying

⁵⁸Wyman, *Public Service Corporations* (1911) § 1.

of the administrative load. The underlying principle of the law does not divide itself on such a basis. The Alliance case has been sharply criticized as violating the cardinal principle mentioned above that the exercise of the police power is a distinct thing in legal nature from regulation on the basis of public nature of the business.

"It is intimated in the principal case that the business of insurance is affected with a public use and therefore subject to a general regulation. But the business of insurance does not constitute either a legal or virtual monopoly. Competition is still keen, and legally it is a matter of common right. Moreover the nature of the business is repugnant to such a theory for a necessary incident of a public calling is the duty to give equal service to all. And if the law should impose such an obligation on underwriters, they would be deprived of that *delectus personarum* which is a necessary incident to a safe conduct of the business".⁵⁹

I quote the above to show how irreconcilable may be the difference of opinion on this subject. On the one hand it is held for an axiom of the law that no business may be public in nature unless a monopoly, though only text writers are cited as authority, basing their text upon older authority of the same court whose opinion it is sought to controvert. It is asserted that it is "legally a matter of common right" which is merely begging the question: for whether it is a matter of common *right* in the true sense will *depend upon* the attitude of the court, not *determine* that attitude. It is asserted that "a necessary incident of a public calling is the duty to give equal service to all", and here again we assume to bind the court on the basis of a classification of fact that must be the *result* of and not the cause of their legal opinion; and the concluding sentence of the note is only an assertion of policy which must find weight, if at all, with the legislature.⁶⁰

In the case of *Munn v. Illinois*,⁶¹ Mr. Chief Justice Waite, speaking for the court said:

"Under these (the police) powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."

⁵⁹25 Harvard Law Rev. 372, at p. 374.

⁶⁰As to the origin and growth of the incidents of the public callings, see Burdick, Origin of Public Service Duties, 11 Columbia Law Rev., 527 et seq.; Wyman, Public Service Corporation, Preface, XII.

⁶¹(1876) 94 U. S. 113, 125, 131.

Later the court says:

" . . . it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great States of the West' must pass on the way 'to four or five of the States on the sea shore' may be a 'virtual monopoly'."⁶²

Seizing upon this last statement an attempt has been made to say that because the principle that "property does become clothed with a public interest when used to make it of public consequence" happened to be applied where there was "a virtual monopoly" it could *not* be applied to any public interest unless it were a virtual monopoly,⁶² an odd sort of *non sequitur* with which courts have sometimes been wont to attempt to limit or foreclose legal principles.

In the case of *Brass v. North Dakota*,⁶³ however, in denying that the right to regulate rates depends upon the fact of virtual monopoly the majority say:

" . . . it is argued that the statutes of Illinois and New York (referring to the *Munn* and *Budd* cases) are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the smaller population of its country towns and villages are said to present no such opportunities.

"The considerations mentioned are obviously addressed to the legislative discretion."

Virtual monopoly may well have been the principal fact back of the legislative policy tested in *Munn v. Illinois* and in *Budd v. New York*; but that does not limit the power of the legislature of North Dakota to make similar regulations, because of the peculiar local incidents of grain growing, the principal business of the state,

⁶²Speaking of the *Munn* case, Mr. Justice Bradley in *Sinking Fund Cases* (1878) 99 U. S. 700, 747, says: "The inquiry there was to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." In the case of *Brass v. Dakota*, Mr. Justice Brown said in his dissent: "* * * the facts show, in the words of Mr. Justice Bradley, no 'practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community.'"

⁶³(1894) 153 U. S. 391, 402-403.

and of the actual economic situation requiring such regulation which the local legislature must know better than the distant court.⁶⁴

The whole process has been one of gradual recognition of the proper relative functions of courts and legislatures under our constitutions.

In *The Pipe Line Cases*⁶⁵ the question was whether pipe lines which had not offered to carry oil in interstate commerce unless it was sold to or through them, could be brought under the Hepburn Act and required to carry as carriers for the public and at rates controlled by the interstate commerce commission. Justice Holmes premised that the handling of this oil was commerce. But of course that fact does not save constitutional objections under the fifth amendment, for while the fact that the handling of this oil was commerce would serve to bring it within the possible range of congressional legislation, yet the legislation of congress under the commerce clause is much limited by the inhibitions of that amendment as is its legislation upon any other conceivable subject.

Here, since the public had a vital interest in the handling of oil, congress has the power to control the dealing in that oil by a pipe line that professes to buy only for itself, even aside from the fact that here was *de facto* commerce.

Call this regulation police power or what we will, the fact remains that the state always, and Congress within its field of legislation, can regulate any business that from the stand point of the public alone is affected by a "broad and definite public interest" or which is in fact operated to the detriment (in the honest judgment of the legislative body) of the public under the guise of purely private business; it can balance the interests of the public and that business. It is true that the court says: "It" (Congress) "may require those who are carriers in substance to become so in form" but in view of the language of the German Alliance Case, that language cannot be construed to mean that the nature of the power of government over a public carrier is essentially different from its power over any other business that vitally affects the interest of the public. So, whatever may be the history of the word "common" as applied to business, we do not, today, put it into a distinct class and regulate it *merely* because it is "common" in some

⁶⁴Note also *Nash v. Page* (1882) 80 Ky. 539, the Kentucky tobacco warehouse case upholding state regulation of the sale on commission of a staple crop of the state.

⁶⁵(1914) 234 U. S. 548, 34 Sup. Ct. 956.

historic sense, but rather because it is fairly deemed by the public to be affected by a broad and definite public interest.

Some light may be thrown upon the scope of the policy—declaring power of the state and its effect upon private claims by considering the extent to which businesses usually private in nature have, in the fact of the fourteenth amendment, been given the right of eminent domain under state statutes. Such power could not be conferred unless some public interest was served, yet such declarations of policy and public interest on the part of state legislatures have been uniformly sustained.

In the case of *Clark v. Nash*⁶⁶ the court speaking through Mr. Justice Peckham says:

"In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land, or for mining should be held to be a condemnation for a public use and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining and other industries. Where the use is asserted to be public and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state where the right of condemnation is asserted under a state statute, we are always, where it can be fairly done, strongly inclined to hold with the state courts where they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where in the absence of such facts, the use would be clearly private. Those facts must be general, notorious and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them . . . these are matters . . . bearing upon the question whether the individual use proposed might not in fact be a public one . . . in this case . . . the use is a public one though the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual where it is absolutely necessary to enable him to make any use whatever of his land . . . the statute . . . was within the legislative power of the state."

In *Strickley v. Highland Boy Mining Co.*⁶⁷ it is said:

⁶⁶(1904) 198 U. S. 361, at p. 367, 25 Sup. Ct. 676.

⁶⁷(1906) 200 U. S. 527, 531, 25 Sup. Ct. 301.

"In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

What is the police power? It has been spoken of as the "law of overruling necessity".⁶⁸ In connection with the above statements it would appear to be only an emergency power to meet unusual and sudden dangers physical or moral. Does the term bear so narrow a construction?

In *Tanner v. Little*⁶⁹ the power is thus described:

"The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests."

In another case the court say:

"The legislature may claim to recognize an evil and apply a remedy or a policy of treatment and if the court cannot say it is unreasonable it will not attempt to overrule it."⁷⁰

It has been held a proper exercise of the police power to require semi-monthly payments to employees and to forbid contracts varying the time of payment between employer and employee;⁷¹ to forbid issuance of scrip in advance payments of wages where the scrip was redeemable at company stores unless the same was redeemable in money;⁷² to forbid the selling of farm products on commission without license and payment of a fee.⁷³ The state may say to the employer:

"You shall not employ your fellow men in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the employment."⁷⁴

⁶⁸*Dunne v. Illinois* (1879) 94 Ill. 120, 141

⁶⁹(1916) 240 U. S. 369, 386, 36 Sup. Ct. 379.

⁷⁰*Rast v. Van Deman & Lewis Co.* (1916) 240 U. S. 342, 36 Sup. Ct. 370 and of *La Tourette v. McMaster* (1919) 248 U. S. 465, 39 Sup. Ct. 160.

⁷¹*Erie RR. v. Williams* (1914) 233 U. S. 685, 34 Sup. Ct. 671.

⁷²*Keokee Consolidated Coke Co. v. Taylor* (1914) 234 U. S. 224, 34 Sup. Ct. 856.

⁷³*Payne v. Kansas* (1919) 248 U. S. 112, 39 Sup. Ct. 32.

⁷⁴*Arizona Copper Co. v. Hammer* (1919) 250 U. S. 400, 39 Sup. Ct. 553.

The state can make requirements as to license of insurance agents so as to bar an agent from doing business in the state.⁷⁵ In the case of *Pierce Oil Company v. City of Hope*⁷⁶ the contention is made that an ordinance as to storage will take the plaintiff's property without due process and destroy its business. As to the state's power to injure or destroy the business the court say:

"... the right to exercise the police power is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good."⁷⁷

Even bill-board advertising may be prohibited in certain localities.⁷⁸ And again:

"It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare."⁷⁹

Mr. Justice Holmes, speaking for the United States Supreme Court in *Noble State Bank v. Haskell*⁸⁰ said:

"It (the police power) may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

It is that general residue of governmental power, resting within the discretion of the legislative department of the government.⁸¹ The only limitation seems to be that it shall be applied to evils generally recognized as such in their nature and not, for instance, to matters of purely artistic judgment.⁸²

But aside from these limitations the legislature is free to form

⁷⁵*La Tourette v. McMaster* (1919) 248 U. S. 465, 39 Sup. Ct. 160.

⁷⁶(1919) 248 U. S. 498, 39 Sup. Ct. 172.

⁷⁷Citing *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 238, 25 Sup. Ct. 18.

⁷⁸*Cusack Co. v. Chicago* (1917) 242 U. S. 526, 37 Sup. Ct. 190.

⁷⁹*Rast v. Van Deman & Lewis Co.* (1916) 240 U. S. 342, 357, 36 Sup. Ct. 370.

⁸⁰(1911) 219 U. S. 104, 111, 31 Sup. Ct. 186.

⁸¹*James Bradley Thayer*, Legal Essays, 27. See also note on *Union Dry Goods Co. v. Georgia Public Service Corp.* (1919) 248 U. S. 372, 39 Sup. Ct. 117, in 33 *Harvard Law Rev.* 97, 100, 101.

⁸²*St. Louis Poster Adv. Co. v. City of St. Louis* (1919) 249 U. S. 269, 39 Sup. Ct. 274; see also *Cusack Co. v. Chicago supra*, footnote 78.

its own judgment up to the point where the courts can say that it "passes the bounds of reason and assumes the character of a purely arbitrary fiat."⁸³ Note in this connection the language of the Supreme Court of the United States in *Budd v. New York*:⁸⁴

"The opinion (of the N. Y. Court of Appeals in the case before the court) further said that the criticism to which the case of *Munn v. Illinois* had been subjected proceed mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice. . . .

"We regard these views . . . as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just."

The duty of the court in dealing with new legislation has been specifically dealt with in a number of recent cases. The earlier view is well expressed in a very recent case,

". . . but all such regulations must tend in some degree toward the prevention of offenses, or the preservation of the public health, morals, safety or welfare. It *must* be *apparent* that some such end is the one *actually intended*, and that there is *some connection* between the *provisions* of the *law* and *such purpose*."⁸⁵

The view of the court is, first, that there must be a necessity arising from the danger to health, morals, safety or general welfare of the state—a proposition which if rightly understood no one will question; and, secondly, that this necessity must be "apparent", that such an "end" is actually intended, and that there is some "connection between the provisions of the law and such purpose". In other words the implication is that the courts, not the legislature, assume to judge when the bounds of the proper exercise of the police power are exceeded.

⁸³*Hebe Co. v. Shaw* (1919) 248 U. S. 297, 39 Sup. Ct. 125.

⁸⁴(1892) 143 U. S. 517, 534, referring to 117 N. Y. 1.

⁸⁵*State v. City of Sheridan* (1918) 25 Wyo. 347, 170 Pac. 1. Italics ours. cf. also *In Re Leach* (1893) 134 Ind. 665, 34 N. E. 641, and *Tolliver v. Blizzard* (1911) 143 Ky. 733, 137 S. W. 509.

This view is even more forcibly expressed in the following statement in a case where the power of a city to regulate the same business, that of a cement contractor, and require a license and fee therefor, was in question:

"It" (the regulation) "should not be sustained, unless vitally necessary to the exercise by the city of the power to designate the material and manner of construction of its walks. No adequate reason is pointed out in the argument of the defendant and we have been unable to conceive one."⁸⁶

And in another case it is said:—

"In order that a statute or ordinance *may be sustained* as an exercise of the police power, the courts must *be able to see* that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof."⁸⁷

But on the point as to whether the court should interfere and balance its judgment against that of the legislature as to the tendency of the legislation in question to meet existing evils, the weight of recent cases seems overwhelmingly against that practice. In *Tanner v. Little*⁸⁸ where the question was of the power of the legislature to prevent the giving of coupons by appellants' stores the court say:

"It is unimportant what the incidents may be called, whether a method of advertising, discount giving or profit sharing. Their significance is not in their designations, but in their influence upon the public welfare. And of this the judgment of the legislature must prevail, though it be controverted and opposed by arguments of strength. Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws nor in the assertion that there is an evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a *belief of evils* that

⁸⁶Gray v. Omaha (1907) 80 Neb. 526, 114 N. W. 600.

⁸⁷In Matter of Jacobs (1884) 98 N. Y. 98.

⁸⁸(1916) 240 U. S. 369, 385, 36 Sup. Ct. 379.

is not arbitrary we cannot measure their extent against the estimate of the legislature."

In *Hebe Co. v. Shaw*, cited above,⁸⁰ the language of the court is:

"If the character or effect of the article as intended to be used be debatable the legislature is entitled to its own judgment, and that judgment is not to be superceded by the verdict of a jury or we may add, by the personal opinion of the judges, upon the issue which the legislature has decided. (*Price v. Illinois*, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405; *Rast vs. Van Deman & Lewis Co.*, 240 U. S. 342, 357, 60 L. Ed. 679, 687.) The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained, and that it is impossible for this court to say that they might not be believed to be necessary in order to accomplish the desired ends."⁸¹

The statement has been repeatedly made in this form:

"... we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise."⁸²

In *Rast v. Van Deman & Lewis Co.*, cited above, the court say:

"Many cases show that the legislature has power to regulate conduct and contracts and in the exercise of the power to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary."^{82a}

And in that case what would be unreasonable? Clearly, from the cases cited that may not be determined as a matter of first-hand judgment by the court in any disputed case—the court will not attempt to give any definition of what is reasonable and declare all other conclusions not in accord therewith unreasonable—they will simply determine whether reasonable men could honestly have

⁸⁰*McLean v. Arkansas* (1909) 211 U. S. 539, 29 Sup. Ct. 206.

⁸⁰(1919) 244 U. S. 590, 37 Sup. Ct. 662.

⁸¹Citing *Atlantic Coast Line v. Georgia* (1914) 234 U. S. 280, 288, 34 Sup. Ct. 829. And in *Sullivan v. City of Shreveport* (U. S. 1919) 40 Sup. Ct. 102, an ordinance requiring both a motorman and a conductor in street cars was held valid although proof was offered of the complete safety of the one man car. It was held that the determination of the local authorities would be upheld as not unconstitutional "except in cases where the power has been exercised in a manner clearly arbitrary and oppressive."

⁸²*Bunting v. Oregon* (1917) 243 U. S. 426, 437, 37 Sup. Ct. 435; *Rast v. Van Deman & Lewis Co.* (1916) 240 U. S. 342, 365, 36 Sup. Ct. 370; *Hamilton v. Kentucky Distilleries & Warehouse Co.* (U. S. 1919) 40 Sup. Ct. 108.

^{82a}*Rast v. Van Deman & Lewis Co.* (1916) *supra* footnote 92, at p. 368.

reached the given conclusion, and if so they may not overrule it. In the case last quoted it is said:

"A distinction is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."

And again in the same case the court say:

"It makes no difference that the facts may be disputed It is not within the competency of the courts to arbitrate in such contrariety."⁹³

One striking instance of departure from the above principle is, indeed, found in a recent case.⁹⁴ By an initiated measure the people of Washington had made it illegal to collect fees for services rendered to those applying for work to employment agencies. The assertion is that this practically destroys the business or renders it impossible. The court says it is a lawful business, not in itself vicious or immoral nor against the general interests of the public and that it *may be regulated* in the interest of the public, but that it may not be prohibited. Here is a limitation on state power based on "fundamental guaranties of the constitution" (which) "cannot be freely suspended if and when some *ostensible* justification is advanced and the police power invoked". There is a strong dissent by Justice Brandeis and with him are Justices Holmes and Clarke; Justice McKenna filed a separate dissent. The minority insist that there is in this case and within the courts' knowledge ample evidence of evils sought to be prevented by the act. The case goes, apparently, upon the basis that this is a statute aimed not to regulate but to utterly destroy a private business. Yet the court here overrules the judgment of the legislature when it might well be admitted that the public end sought is not widely at variance with the means adopted. There is, then, no fixed criterion as to when legislative power may be used to regulate a given business. The courts do not admit that a criterion binding today will, of necessity, be binding at any future date.

⁹³McKenna, J., *Rast v. Van Deman & Lewis Co.* (1916) *supra* footnote 92, at p. 357. In *Branson v. Bush* (U. S. 1919) 40 Sup. Ct. 113, the question is whether the legislature may fix the lands benefitted by an improvement so as to make the assessment binding upon those lands unless the determination is "arbitrary and wholly unwarranted," "a flagrant abuse and by reason of its arbitrary character a confiscation of particular property."

⁹⁴*Adams v. Tanner* (1917) 244 U. S. 590, 37 Sup. Ct. 662.

Notions as to the proper economic policies to be pursued are never fixed. For centuries in England close regulation was the rule, in the 18th and 19th centuries freedom from restraint was the rule. Within a generation the policy of *laissez-faire* gave way to a partial regulation to meet the unwelcome fact of monopoly, and later the tendency extended to all cases of virtual monopoly as to things necessary to the public need. Shall we say that the law changed with each step of this history? That will depend upon what we mean by the law; if we refer to the practice which was adopted and acquiesced in by courts and legislatures, then the law changed; but if we refer to the set of principles that governed and defined the limits of proper legal action, then these remained the same. Those principles may be summed up in this, that the legislative body may go so far in the way of business regulation as the needs of society may demand and the opinions of society warrant. Nevertheless at each step the proponents of a given policy have almost universally felt that the legislative power was fundamentally restricted by their chosen economic standard or criterion. The latest and perhaps most advanced complete theory of the power of regulation laid down in any text-book is that of Professor Wyman.⁹⁵ Professor Wyman takes for the criterion and measure and limit of government power the fact of virtual monopoly. He says:

" . . . this conception of virtual monopoly will cover everything. Nothing narrower will do, . . . if virtual monopoly is made out as a permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature. On the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. Under our constitutional system a distinction is made upon this line. In the public calling, regulation of service, facilities, prices and discriminations is possible to any extent. Monopolistic conditions demand such a policy; and at no period in history has this been more apparent than now. *In the private callings no such legislation should be permitted.* Where competitive conditions prevail there should be freedom; and at no epoch in our industries has it been more important to insist upon this."⁹⁶

In his statement the learned author seems convinced that if there is virtual monopoly the policy of the law is fixed; if there is

⁹⁵Public Service Corporations (1911) c. IV.

⁹⁶*Op. Cit.*, § 156.

virtual competition it is absent. Is he arguing for a rule of law or for a rule of economic policy when he says that "in the private callings, however, *no such legislation should be permitted* . . . competitive conditions should be left without such restrictions"? Is the argument intended to be that the judgment of the court on a matter of economic fact should be so used by it on the basis of an assumed legislative policy as to override an enactment of a legislature? We do not quarrel with Mr. Wyman's belief that virtual monopoly is a sound basis for some interference somewhere; we do object to his assumption that as a matter of law monopoly must be the *exclusive basis* of interference and that the legislature is powerless to interfere with competitive business unless upon a basis wholly historical as in the case of the inn-keeper. But, suppose we, as a people, find that competition is wasteful, and that because of the increasing pressure of population, the exigencies of war, or the demands of a reconstruction period, such waste is seen to be the greatest of economic crimes; in such a case is the test of monopoly, defined as the absence of free competition, an adequate measure of the *power* of the state to interfere?

That the test has been deemed adequate up to this time is due to the fact that the trust problem and interferences with trade for the sole purpose of controlling prices has been foremost in the public mind. But, a year ago, when war made waste and friction the greatest of economic evils, or today when all the resources of the world are needed for its rebuilding; and in the face of the fact that free land and superabundance of raw materials are a thing of the past—in the face of such situations may we not question the truth of the postulate that monopoly is the only economic situation justifying regulation, or that unrestricted competition is a universal legal or economic necessity?

Indeed the modern form of statement is coming to be that competition will not work *unless* regulated.⁹⁷

⁹⁷"It is apparent to students of present day economics that a very real conflict is on in this country between two alliteratively designated economic theories, competition—cooperation. The result of this conflict no man can foresee * * *"; and also: "unrestrained and unregulated competition lends to monopoly". See Nathan R. Williams, *Annals American Academy Political and Social Science* Vol. LXIII. And note the following by Louis D. Brandeis, now on the Supreme Court Bench, taken from 18 *Case and Comment*, at p. 494. "The issue is not (as it is usually stated by advocates of monopoly), shall we have unrestricted competition or regulated monopoly? It is, shall we have regulated competition or regulated monopoly."

"Regulation is essential to the preservation of competition just as it is

Competition can never be entirely free, the natural and accidental differences are too great; indeed, competition may become simply the game by which one seeks to defeat his fellows by attaining a monopoly position; then it is war, it is waste. But competition as an ideal of trade relation is too deeply ingrained in our industrial life and notions to be lightly uprooted. Its advantages are thus expressed by Mr. Brandeis in the article cited above:

"Undoubtedly Competition involves waste. What human activity does not? The wastes of democracy are among the greatest obvious wastes, but we have compensations in democracy which far outweigh that waste and make it more efficient than absolutism. . . . there are wastes of competition which do not develop but kill. These the law can and should eliminate by regulating competition."

Mr. Wyman says:

"Whenever virtual monopoly is found the situation demands this law, that all who apply shall be served with adequate facilities, for reasonable compensation and without discrimination, otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these industrial wrongs—actual monopoly should be dealt with upon the same basis as legal monopoly and indeed is so treated by the inclusion of both within the law of public employments."⁸⁸

This series of statements is rather remarkable for if by the word "demand" in the first part of the quotation in regard to virtual monopoly he merely means that it ought to be so but is not, it is hardly consistent with its last statement in regard to actual monopoly that the latter is included in the "law of public employments" by the courts. Probably the latter statement is not true as it stands and certainly the author in the instances cited to prove it fails to confirm it, for the citations are of cases of public supply of water, gas and telephone under conditions falling within the definition of legal monopoly. But if the above statement were

necessary to the preservation of the best development of liberty. We have long curbed physically the strong to protect those physically weaker. More recently we have extended such prohibitions to business. We have restricted theoretical freedom of contract by factory laws. The liberty of the merchant and manufacturer to lie in trade, expressed in the fine phrase *caveat emptor*, is yielding to the better conception of business ethics, before pure food laws and postal fraud prosecutions. Similarly the right to competition must be limited to preserve it. For excess of liberty leads to absolutism. The extremes meet.

"The issue, therefore, is: Regulated competition versus regulated monopoly."

⁸⁸Public Callings and the Trust Problem, 17 Harvard Law Rev. 166.

taken to mean that such is the law "because otherwise there would be no remedy for these industrial wrongs" the statement is indeed remarkable. It is, viewed in that light, an attempt to apply literally the old maxim "*ubi jus, ibi remedium*". But even though this were really a self-executing principle of the common law universally applicable, where is the "jus" in the statement? The author speaks of "oppression, inconvenience, extortion and injustice" as "industrial wrongs", and then, from the apparent application of the above maxim assumes that they are *legal* wrongs or breaches of a legal right. But if we define a legal right as the capacity we have through the law to influence the actions of others and make certain claims effective, can the fact that the thing complained of is an "industrial wrong" or the violation of an industrial interest make it a right in the legal sense and necessarily remediable at law? What the learned author intends, probably, is that they should have an influence on the law, but he missed the necessary legislative step in such a case, that is, if the remedy is not to be delayed until the result is accepted uniformly by the views of society; for up to that point the courts should not recognize a new policy in the matter, but should await legislative guidance.

What, then, is the substance of the "fundamental right" of private business? Can it in its last analysis be more than this—that the legislature may not wantonly outrage the sense of what is just in the community nor disregard the interests of that society? And is not the "change" that the courts speak of as appearing in our law merely this—that now in testing the reasonableness of a regulation we look primarily if not wholly to the interest of society, leaving the individual fortunes to be protected by the general interest which that society must feel in the welfare of its members; whereas for two centuries past we considered the state as made up primarily of individuals and the law as only the resultant of their *individual rights* as expressed in the community life? In other words, in balancing the interests of the community and the individual the legislature now feels justified in looking primarily to the community interest, whereas formerly they felt the obligation to regard primarily the individual interest and consider the community interest only to the extent necessary to keep a just balance between the individual citizens. And, on the side of the courts, the emphasis has shifted and with it the burden of proof. Formerly in an inquiry the court merely looked to see if the individual interest was touched; if so, the state must show by an overbalancing of the

testimony that the rule was necessary to secure general interests which vitally affected the community or that other individuals would by the situation legislated against be deprived of a like freedom; today the only inquiry is as to whether the action of the legislature appears wholly arbitrary and uncalled for in the interest of society, the burden being upon the one seeking to show this arbitrary character in the statute.⁹⁹

But, it may be asked, is the liberty guaranteed by the constitution then gone? No, for that liberty of occupation cannot without reason of a public nature, be touched—that is the essence of that liberty. The content of the conception, however, depends primarily upon the legislative judgment, and the court is not willing to say that a co-ordinate branch of the government is in the wrong unless upon substantial proof. The court has merely ceased weighing its policies against those of the legislature because it has recognized that to do so would be the assumption of a political function that does not belong to it. The new idea is simply restoring to practice the separation of duties indicated in the constitution. This has been better expressed elsewhere.

“To oppose legislative discretion by undefined judicial standards is to oppose legislative by judicial discretion, and constitutional doctrines so vaguely formulated cannot be expected to command confidence.”¹⁰⁰

And again at page 33 the same author says:

“The attempt of the courts to check modern social legislation by constitutional principles can be properly estimated only if we recognize in it the exercise of a political and not a strictly judicial function.”

Thus in our law we find two opposing tendencies. On the one hand we protect individual freedom, we protect the right of acquisition, and we protect the acquisition itself; on the other hand we do not permit anti-social activities or tendencies, and in case of conflict the latter principle must prevail. Therefore the law must change as to all activities under the former class whenever they become obnoxious under the latter principle. Business must not be interfered with until it becomes incompatible with the general good, but when that occurs it must yield.

⁹⁹In this connection compare *Wynehamer v. People* (1856) 13 N. Y. 378 with the case of *Mugler v. Kansas* (1887) 123 U. S. 623, 8 Sup. Ct. 273, and *Kidd v. Pearson* (1888) 128 U. S. 1, 9 Sup. Ct. 6.

¹⁰⁰Freund, *Standards of American Legislation*, 5.

It will be objected that this theory leaves too much to legislative discretion and that legislators will not always be wise in choosing policies. We are, however, not dealing with the question of advisability or policy, but merely with the question of legislative power; and under our form of government it is a perversion of functions for another branch of the government to attempt to thwart legislative policies unless the constitution expressly commands, as, for instance, where the president may, by reason of its provisions, guide such policies by his advice or limit them by his power of veto.

Yet even if it were a matter of policy alone there is something to be said on both sides of the question. Professor Pound has pointed out that in the early history of our government more reliance was placed upon the legislative branch of the government, an emphasis which later shifted to the courts and then to the executive.¹⁰¹ He has also pointed out that with each shift there came predictions of disaster as a result, predictions which were not fulfilled. Each stage was merely the result of some new condition or necessity which gave prominence to one function of the government or the other according to the nature of the need. It is true we may be driven to more scientific methods in our statute making, but these are matters which can be moulded only through awakened public opinion. As we have come to rely more and more on the courts to referee the legislative game we have become more and more indifferent to the quality of our legislators. The courts, under the influence of this spirit, have become too prone to overstep their constitutional bounds and set their own theories of policy against those of the legislature. When it is brought home to the people that there is real power in the legislative department we shall be more careful in our selections of legislators. Distrust of governmental agencies has been common to all times, yet seldom, in modern times, fully justified. Our prejudices add as much to our distrust as do our experience or our knowledge; and we know that in the long run the recognition of added responsibility increases rather than impairs efficiency in the body entrusted therewith.

To sum up: our contention is that the question whether a given business may be deemed affected with the public interest and regulated by the government is a matter for determination by the legislature as the policy-determining branch of the government; that

¹⁰¹The Administrative Application of Legal Standards, read before the Section of Public Utility Law of the American Bar Association at Boston, Mass., September 2nd, 1919.

the determination may be a mere declaration of an existing fact under old policies or it may be the fixing of a new policy affecting new businesses because of urgent social and economic demands; that such determination, if made in good faith, does not, in its effect upon any business, violate the fifth or fourteenth amendments of the federal constitution; that the fact of monopoly is significant only as one among many possible social and economic situations that may be considered by the legislature in adopting its policy; and finally, that such legislative determination should be upheld by the courts unless the latter can say that in view of all conditions, social, economic and physical, that the determination could not have been made in good faith.

JOHN B. CHEADLE

UNIVERSITY OF OKLAHOMA LAW SCHOOL